SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 499

FEDERAL TRADE COMMISSION, *Petitioner*

v.

TEXTILE AND APPAREL GROUP, AMERICAN IMPORTERS ASSOCIATION, ET AL., *Respondents*

No. 500

NATIONAL KNITTED OUTERWEAR ASSOCIATION, ET AL., *Petitioners*

v.

TEXTILE AND APPAREL GROUP, AMERICAN IMPORTERS ASSOCIATION, ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinion Below	1
Question Presented	2
Counter-statement of the Case	2
Argument	
I. The Wool Products Labeling Act makes no distinction between imports and domestic products in requiring a hearing and reviewable order on the issue of misbranding	6
II. The statute's "boiler-plate" provisions authorizing the issuance of rules and regulations and cooperation with other agencies do not empower the Federal Trade Commission to substitute an *ex parte* licensing scheme for the statutory cease-and-desist remedy	9
III. If petitioners believe that the statutory enforcement scheme is inadequate and that there is a need to impose licensing restrictions upon imports, the petition for such remedy should be addressed to the Congress, not to this Court	13
Conclusion	15

CITATIONS

CASES:

F.C.C. v. American Broadcasting Co., 347 U.S. 284, 296; 98 L. Ed. 699 (1954) 11

Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134; 80 L. Ed. 528, 531 10

Page

STATUTES:

Administrative Procedure Act, 5 U.S.C. § 558(b) ..4, 10, 11
Federal Trade Commission Act, 15 U.S.C. § 41 ....2, 3, 4, 5, 6, 7, 8, 14, 15
Wool Products Labeling Act, 15 U.S.C. § 68 ....2, 3, 4, 6, 7, 8, 9, 12, 13, 14, 15

MISCELLANEOUS:

CCH Trade Regulation, Vol. 2, ¶ 9565, ¶ 9850, ¶ 9851 ..... 11, 12
Customs Regulation, 19 CFR § 11.12 13
Hearings, Committee on Appropriations, House of Representatives, 90th Congress 4
American Society for Testing and Materials, Manual D 628-59T 5
In the Matter of R. H. Macy & Co., FTC Docket 8650 5
Report of A.B.A. Commission to study the Federal Trade Commission, issued September 15, 1969 .. 13
Senate Report No. 752, on Administrative Procedure Act, 79th Congress, 1st Sess., Sen. Doc. 24 ....10, 11
Senate Report No. 1685 on S. 3502, 75th Congress, 3rd Sess. (1938) 9, 14

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia is reported at 410 F. 2d 1052 and reproduced in the Appendix to Petition No. 499 herein, pages 1a to 17a. The orders of the District

Court, set forth at pages 18a to 21a of Petition No. 499, are unreported.*

QUESTION PRESENTED

Where the Wool Products Labeling Act specifically provides the remedies available to the Federal Trade Commission to deal with misbranding of wool products, should this Court approve the Commission's adoption by rule-making of an *ex parte* licensing scheme which Congress refused to authorize?

COUNTER-STATEMENT OF THE CASE

The Government's Petition states that "in enforcing the Act with respect to wool products produced in the United States, the Commission utilizes the familiar cease-and-desist procedure established by Section 5 of the Federal Trade Commission Act . . ." and that it uses a different procedure with respect to imports, i.e., Rule 36. Pet. #499 p. 4. To put this case in proper perspective, it should be noted at the outset that since its enactment 30 years ago, the Commission has enforced the Wool Products Labeling Act, both against misbranded imports and against misbranded domestic products, by means of the same procedure, i.e., the

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* Citations to the opinion below are preceded by the abbreviation "Pet. App."

Citations to the record below as contained in the Appendix below, Volume I are preceded by the abbreviation "App."

The pertinent statutes, regulations and congressional hearings are collected in Volume II of the Appendix below and the documents therein are designated by the letters A through G. Such references are preceded by the abbreviation "App. II, Doc. —".

The Wool Products Labeling Act is sometimes referred to herein by the abbreviation "W.P.L.A."

The Federal Trade Commission Act is sometimes referred to herein by the abbreviation "F.T.C.A."

cease-and-desist order entered in accordance with Section 5 of the Federal Trade Commission Act. Only in December 1967, when the Commission issued Rule 36 did it attempt to deprive importers of the due process to which they are entitled under the statute by barring distribution of their goods in commerce without a hearing, without any finding of violation, and without the entry of a reviewable order. That regulation was in effect for less than a week when a preliminary injunction against its enforcement was entered by the District Court, subsequently confirmed by the permanent injunction entered in accordance with the Court of Appeals' decision below.

The petitions filed herein for review of that decision ask this Court to look at only part of the regulation in question in the light of only fragmentary portions of the statute under which it was issued. When the full impact of the regulation is considered, however, in the light of the Wool Products Labeling Act in its entirety, it is readily apparent that the unanimous decision of the Court of Appeals as set forth in the opinion of Judge J. Skelly Wright (in which Judges Burger and McGowan joined) is clearly correct.

In its restatement of the provisions of Rule 36, the Government describes the various applications, notices and tests for which the Rule provides, concluding with the following statement: "The Commission will immediately issue a notice of release if the test results show the product to be correctly labeled, or, if the tests reveal that the goods are misbranded, as soon as they have been correctly relabeled." Pet. #499 p. 6.

Nowhere in the Government's Statement of the Case is anything said about the procedure whereby the

Commission determines whether or not the product is correctly labeled, or how it should be relabeled; or what happens if the importer disagrees with the Commission's determination in this regard. Nothing is said about the manner in which controversial issues of this sort are to be resolved. Rule 36 makes no provision whatever for any of the safeguards of fairness required by traditional standards of due process as set forth in the Wool Products Labeling Act, the Federal Trade Commission Act, and the Administrative Procedure Act.

Under Rule 36, the determination to detain imported wool products at the port of entry until they have been tested, and the determination of when to release them or whether to release them at all, is arbitrarily made by anonymous members of the Commission's staff without a hearing, without a written record, and without any findings reviewable by the Commission itself, let alone a written order that would be subject to judicial review. The critical tests are conducted not by the Commission in its own laboratory, but by a private firm selected by the Commission [1] whose report is conclusive upon the importers, though not necessarily so, upon the Commission.[2] Although the art of testing

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[1] "Indeed, the Rule goes so far as to provide that the Commission will not conduct any tests unless the importer pays for them. Thus, if an importer cannot afford to bear the expense of testing, his goods will not be released even where, if tests were conducted, they would show the goods to be correctly labaled." Dissenting Statement of Commissioner Elman, App. 41.

[2] The Chairman of the Commission has testified that the goods would be released only if the Commission agrees with the laboratory report. Hearings, Committee on Appropriations, House of Representatives, 90th Congress (App. II, Document G, Exh. 2, p. 947).

wool products for fiber content is far from perfected,[3] no opportunity is afforded for cross-examination of the person who conducted the test or for submission by the importer of countervailing evidence or test results. Rule 36, App. II, Doc. A., Pet. 499 pp. 13a-17a.

If the Commission's inspector believes that the wool content is different from that stated on the label, he need take no action whatsoever—the goods simply remain at the port of entry until they rot; the importer has no remedy, no appeal to the Commission, and no right of judicial review. Under Section 5(c) of the Federal Trade Commission Act, cease-and-desist orders of the Commission entered in accordance with Section 5(b) are reviewable by a United States Court of Appeals; but under Rule 36, no order is ever entered by the Commission and no record is made which could be the subject of judicial review.

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[3] See Affidavit of Michael P. Daniels, App. 51: "The testing and analysis of textiles is not an exact science. No machine has yet been invented that will automatically and accurately measure the percentages of the various component animal fibers in a given fabric. The testing of wool products containing the various blends of wool, reused wool, reprocessed wool, cashmere, mohair, etc. is an expensive and laborious process. It involves problems in the selection of a representative sample to be tested, the microscopic examination of the sample, measurement of fiber diameters under microscopic projection, and the counting of individual fibers of various descriptions and measurements by human beings exercising subjective judgment and subject to human error. According to the Manual of the American Society for Testing and Materials, 'The accuracy obtainable with microscopic methods depends to a considerable extent upon the ability of the analyst to identify the different fibers present in the mixture.' (Manual D 628-59T, p. 322) An example of the complexity and subjectivity of the testing process is vividly conveyed by the Trial Examiner's Findings of Fact In the Matter of R. H. Macy & Co., FTC Docket No. 8650, Findings No. 72-118." App. 61-63.

As Commissioner Philip Elman succinctly summed it up in his statement dissenting to the issuance of Rule 36:

> "The short of it is that the Commission is using Rule 36 as a means for depriving wool importers of all the substantive and procedural rights and protections which our law properly gives them in the same measure as domestic manufacturers. In practical effect, Rule 36 creates a presumption that wool imports entering the United States are misbranded unless and until the importer proves otherwise. The Commission's refusal to issue a notice of release need be supported only by its own *ipse dixit*. No administrative hearing of any sort is provided. No record is made. No findings of fact or conclusions of law need be stated. No opportunity is afforded for judicial review."
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> App. 41

ARGUMENT

The decision below, holding that the Federal Trade Commission cannot assume powers which Congress refused to confer, is plainly correct. It involves no general question of federal law that has not been previously decided by this Court and it is not in conflict with any decision rendered by another Court of Appeals.

I. The Wool Products Labeling Act Makes No Distinction Between Imports and Domestic Products in Requiring a Hearing and Reviewable Order on the Issue of Misbranding

The basic enforcement remedy of the Wool Products Labeling Act (App. II, Doc. B) is the cease-and-desist order entered in accordance with the procedure provided in Section 5 of the Federal Trade Commission Act (App. II, Doc. C). The remedy is applicable to "any person" violating the provisions of the Act,

whether manufacturer or distributor and whether the origin of the goods is domestic or foreign. Sec. 6(a) of the Act reiterates that:

> "*any such person violating the provisions of this Act shall be subject to the penalties and entitled to the privileges and immunities provided in said Federal Trade Commission Act,* in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though the applicable terms and provisions of the said Federal Trade Commission Act were incorporated into and made a part of this Act."

15 U.S.C. § 68d(a) (Emphasis supplied)

In addition to the cease-and-desist order, Congress also provided in the Wool Products Labeling Act for three ancillary enforcement remedies not contained in the Federal Trade Commission Act, i.e.:

§ 7(b), W.P.L.A., (15 U.S.C. § 68e(b)) which authorizes the Commission to seek and obtain a preliminary injunction in a United States District Court enjoining the misbranding of wool products until the Commission issues a complaint and cease and desist order under § 6(a) of the Act;

§ 7(a), W.P.L.A., (15 U.S.C. § 68e(a)) in which the United States District Court is authorized to seize and confiscate misbranded wool products upon a proper showing by the Commission; and

§ 8, W.P.L.A., (15 U.S.C. § 68f) which provides for the imposition of a penal bond upon the shipment of wool products by an importer found to have falsified or omitted the required disclosure on shipments from abroad.

The only one of the above enforcement provisions which makes any distinction between imported and

domestic products is Section 8. Sec. 8 requires that all imports of wool products into the United States shall be accompanied by invoices setting forth the information required under the Act and provides that the failure to set forth the required information in the said invoices or the falsification of any invoice or consignee's declaration shall be considered an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act. It provides that any person who falsifies or omits disclosure of the said information, "may *thenceforth* be prohibited by the Commission from importing, or participating in the importation of any wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of the said wool products and any duty thereon, conditioned upon compliance with the provisions of this Act." 15 U.S.C. § 68f (Emphasis added.)

Under the statutory enforcement scheme, therefore, the Federal Trade Commission has no power to stop the shipment or distribution of wool products, imported or domestic, except by issuing a complaint under § 5(b), F.T.C.A., proving misbranding at an adversary hearing before an impartial examiner, and entering a cease and desist order appealable under § 5(c), F.T.C.A. And the Commission has no authority to impose the penal condition of a bond upon a shipment of imported wool products unless the importer has been previously found to have falsified the disclosure required by § 8, W.P.L.A.

In Rule 36, on the other hand, the Commission has sought to impose what amounts to a preliminary injunction upon the shipment of imported wool products without ever having applied to any District Court

therefor under § 7(b), W.P.L.A., and it has conditioned the shipment of imported products upon the posting of a penal bond, whether or not the importer has previously falsified an invoice or customs declaration in violation of § 8 of the Act. The new regulation in effect rewrites the Wool Products Labeling Act so as to convert the Commission's statutory power to issue cease-and-desist orders into an assumed power to grant and deny licenses. Instead of making the Commission's staff prove misbranding before shipment of an importer's goods is prohibited, as required by the Act, the regulation makes the importer prove that his goods are not misbranded before they are licensed or "released" for shipment without liability for liquidated damages under the bond.

II. The Statute's "Boiler-Plate" Provisions Authorizing the Issuance of Rules and Regulations and Cooperation With Other Agencies Do Not Empower the Federal Trade Commission To Substitute an Ex Parte Licensing Scheme for the Statutory Cease-and-Desist Remedy

If Congress had not provided a comprehensive enforcement scheme, covering imported as well as domestic woolens, there might conceivably be a plausible basis for the Commission's argument that the Federal Trade Commission is free to improvise such remedies as it may choose. Where, as in the case of the Wool Products Labeling Act, Congress was precise and explicit in the remedies which it authorized and where it carefully considered, and deliberately rejected [4] the very type of enforcement scheme which the Commission is now asking this Court to approve, the argument cannot be seriously entertained.

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[4] S. 3502 § 8, Senate Report No. 1685, 75th Congress, 3rd Sess. (1938), App. II, Doc. E. See footnote 13, *infra*.

Petitioners ask this Court to disregard the specific remedies of the Act and to look only at the general "boiler-plate" provisions authorizing the Commission to adopt rules and regulations and to cooperate with other agencies. Neither rule-making nor cooperation, however, add any weight to petitioners' argument.

(a) Rule-making

The rule-making power included at the end of Sec. 6(a) authorizes the Commission to make rules and regulations necessary and proper for implementation of the statutory enforcement scheme. It does not authorize the adoption of regulations which supersede the specific remedies provided by Congress and which vitiate the privileges and immunities which Congress conferred. It does not authorize the Commission to assume licensing powers that Congress refused to confer. This Court has long recognized that "[T]he power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law."[5] The principle was restated by Congress in Section 9 of the Administrative Procedure Act which provides that: "A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558 (b). The Report of the Senate Judiciary Committee on this provision indicates that Rule 36 is precisely the sort of administrative over-stepping Congress sought to prevent when it enacted Sec. 9:

> "[A]gencies may not impose sanctions which have not been specifically or generally provided for them

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[5] *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 134; 80 L. Ed. 528, 531. See also *F.C.C.* v. *American Broadcasting Co.*, 347 U.S. 284, 296; 98 L. Ed. 699 (1954).

> to impose. Thus, *an agency which is authorized only to issue cease-and-desist orders may not set up a licensing system;* and conversely a licensing authority may not assume to issue desist orders.

Administrative Procedure Act, Report of the Committee on the Judiciary, 79th Congress, 1st Session, Report No. 752, Sen. Doc. 24, p. 211. Appendix II, Document F (Emphasis Supplied).

(b) Cooperation

As a last resort, the Government attempts to read the phrase "cooperate with any department or agency" as permitting the Commission to coopt some authority from another agency whenever it wants to issue a regulation beyond the scope of its own statutory powers. Here again, the Commission runs headlong into Sec. 9 of the Administrative Procedure Act, *supra.* The Report of the Senate Judiciary Committee, *supra,* goes on to explain that Sec. 9 means "that *no agency may undertake directly or indirectly to exercise the functions of some other agency.* The subsection confines each agency to the jurisdiction delegated to it by law." Appendix II, Doc. F. (Emphasis added)

When Congress provided that the Federal Trade Commission cooperate with other agencies, it did not give it a roving commission to issue rules and regulations governing the conduct of other agencies. The kind of cooperation contemplated by the statute is indicated by the cooperative arrangements which the Federal Trade Commission has entered into with other agencies having overlapping or contiguous jurisdiction.[6] The Federal Trade Commission has a Working

[6] CCH Trade Regulation Vol. 2, ¶ 9565.

Agreement with the Food and Drug Administration clarifying the respective jurisdiction of each agency vis-a-vis deceptively advertised foods, drugs and cosmetics;[7] but it has not presumed to issue a regulation ordering the Food and Drug Administration to withhold certification of drugs marketed with questionable advertising practices. The Federal Trade Commission has a cooperative arrangement with the Federal Communications Commission providing for consultation and advice on questionable advertisements broadcast over radio and television stations;[8] but it has not presumed to issue a regulation directing the Federal Communications Commission to deny licenses to stations carrying advertising of which the Federal Trade Commission disapproves. Yet it asks this Court to hold that under color of "cooperation", it can issue a regulation directing the Bureau of Customs to bar entry under the Tariff Act of woolens the F.T.C. has not cleared.

If what the Commission intended in Rule 36 was to cooperate with Customs in its enforcement of the Tariff Act of 1930, the issuance of a regulation under the Wool Products Labeling Act, which on its face purports to be a self-sufficient, comprehensive and independent regulatory scheme, was certainly a strange way of going about it. Cooperation by its very definition implies mutuality or agreement. There is no mutuality whatever in Rule 36 and there is nothing in this record indicating any agreement on the part

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[7] Id. ¶ 9850.

[8] Id. ¶ 9851.

of the Bureau of Customs in its adoption.[9] Rule 36 is strictly a unilateral product of the Federal Trade Commission. The Bureau of Customs has its own regulation purporting to exercise whatever authority it may have under the Tariff Act.[10] That regulation has never been rescinded and there is nothing in this record to indicate that Customs needed or wanted the Federal Trade Commission to promulgate an additional regulation telling it how to discharge its own statutory responsibility.

III. If Petitioners Believe That the Statutory Enforcement Scheme Is Inadequate and That There Is a Need To Impose Licensing Restrictions Upon Imports, the Petition for Such Remedy Should Be Addressed to the Congress, Not to This Court

The domestic manufacturers argue in their petition (No. 500) that "the decision below adversely affects the public interest in being protected against mislabeled foreign wool imports". (Pet. #500, p. 13) We respectfully submit that the public interest is well protected by the Act as drafted by Congress. If the domestic manufacturers want more protection[11] against

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[9] Certainly not the hearsay testimony of Chairman Dixon before the House Appropriations Committee cited at Footnote 10 of the Government's Petition. By way of contrast, it is interesting to note that the Federal Trade Commission does have a bilateral agreement with the Bureau of Customs providing for mutual cooperation to avoid duplication of enforcement effort on other labeling matters. See Liaison with Bureau of Customs re labeling of foreign goods so as to disclose foreign origin, CCH Trade Regulation ¶ 9565.15.

[10] 19 CFR § 11.12. However, "[I]t is not at all clear that Customs was meant to enforce a rule as rigorous, and as *ex parte*, as Rule 36." Opinion below, Pet. App. 12a.

[11] Cf. Report of A.B.A. Commission to study the Federal Trade Commission, issued September 15, 1969, pp. 45-47.

competing imports, the forum in which it should be sought is the Congress of the United States, not the Federal Trade Commission and not this Court.

Licensing restrictions on imports were sought by petitioners' predecessors at the time the Act was originally introduced in Congress. A provision similar to that embodied in Rule 36—although by no means as arbitrary—was included in Sec. 8 of the original Wool Products Bill. It was reported out of the Senate Committee on Interstate Commerce, but Congress in its wisdom decided to delete it from the Bill that was finally passed[12] and to substitute the present Sec. 8 making falsification of the requisite disclosure an unfair trade practice under the Federal Trade Commission Act subject to the procedural safeguards of that Act. Instead of conditioning entry of imports upon the posting of a customs bond, Congress decided to require such bond only as a penalty for violation, after notice and hearing under Sec. 5 F.T.C.A.

The decision below invalidating Rule 36 does not, as petitioners suggest, leave offending importers beyond the reach of the Federal Trade Commission. The Commission still has powers to issue cease-and-desist orders against misbranded imports, the same as it does aginst misbranded domestic goods. The Commission can still obtain seizure of the offending goods and/or preliminary injunction against their distribution pending completion of its administrative proceedings. The Commission can still obtain sanctions up to $5,000 per

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[12] S. 3502, 75th Congress, 3rd Session (1938). App. II, Doc. E. The pertinent legislative history is discussed in the Court of Appeals' Opinion, Pet. App. 7a through 10a. In the interest of brevity, we shall not repeat it here.

day for a violation of its orders. F.T.C.A. Sec. 5(d). And any importer found to have withheld or falsified the disclosure required by Sec. 8, may still be prohibited from importing or participating in the importation of any wool products except upon filing of a customs bond.

All these remedies have been placed at the Commission's disposal if they will only use them. But all of them are predicated upon a prior hearing and the entry of a reviewable order—traditional safeguards of due process which Congress wrote into the Wool Products Labeling Act and which the Commission in Rule 36 sought unsuccessfully to expunge.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari filed herein should be denied.

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